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No. 82-6483

IN THE

SUPREME COURT OF THE UNITED STATES

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

OCTOBER TERM, 1982

VERNON THADDEUS TALIAFERRO,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the trial judge's discretionary ruling that Petitioner's alleged alibi witness could not testify as a result of Petitioner's admitted failure to comply with Maryland Rule 741 constitute a denial of due process and the right to compulsory process?

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STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case with the additional facts included in the argument that follows.

SUMMARY OF ARGUMENT

Although the question presented is significant, resolution of the issue under the facts of the instant case is not warranted.

REASONS WHY THE WRIT SHOULD BE DENIED

THE QUESTION OF WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE TRIAL JUDGE'S DISCRETIONARY RULING THAT THE ALLEGED ALIBI WITNESS COULD NOT TESTIFY AS A RESULT OF PETITIONER'S ADMITTED FAILURE TO COMPLY WITH MARYLAND RULE 741 SHOULD NOT BE ADDRESSED BY THIS COURT BECAUSE MARYLAND'S DISCOVERY RULE IS RECIPROCAL AND PETITIONER'S FAILURE TO COMPLY WAS EGREGIOUS.

In both Wardius v. Oregon, 412 U.S. 470, 472, n. 4, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973) and Williams v. Florida, 399 U.S. 78, 83, n. 14, 90 S.Ct. 1983, 26 L.Ed.2d 446 (1970), this Court

expressly declined to rule on whether the preclusion of alibi testimony due to non-compliance with discovery rules is constitutionally permissible. However, the mere fact that the question presented in the instant case remains unresolved by this Court, should not warrant the automatic grant of certiorari.

The Maryland discovery law, Maryland Rule 741 (Apx. 1-3), requires reciprocal duties of both the defense and the prosecution. In Williams v. Florida, 399 U.S. at 81-82, this Court rejected a due process challenge to Florida's notice of alibi rule which contained such reciprocal requirements:

We need not linger over the suggestion that the discovery permitted the State against petitioner in this case deprived him of "due process" or a "fair trial." Florida law provides for liberal discovery by the defendant against the State, and the notice-of-alibi rule is itself carefully hedged with reciprocal duties requiring state disclosure to the defendant. Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate. Reflecting this interest, notice-of-alibi provisions, dating at least from 1927, are now in existence in a substantial number of States. The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as "due process" is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence. [Footnotes omitted.]

In Wardius v. Oregon, this Court held that Oregon's notice of alibi rule was violative of due process because the prosecution was not required to give reciprocal discovery rights to the defendant.

The grant of certiorari is not merited for yet another reason. The sanction imposed against Petitioner, a prohibition on the receipt of testimony from his alleged alibi witness, was due to more than a simple technical violation of Maryland Rule 741. The trial judge specifically found that Petitioner had not exercised due diligence in locating the alleged alibi witness,

Edward Rich, and bringing him to the attention of the court and prosecution (A. 90-91). Petitioner had been arrested on November 28, 1979, released on bond the following day and remained on bail continuously until his sentencing. Under Maryland Rule 741e disclosure of any alibi witness was due to be furnished by February 11, 1980, in response to the State's February 1 motion for discovery requesting, inter alia, the name and address of all alibi witnesses other than Petitioner himself. It was not until the second day of trial, May 22, 1980, that Petitioner apprised the court of the Rich's existence. However, Petitioner testified that around December of 1979 he had contacted Rich and Rich was willing to come to court. At that time Rich had been residing with his mother who had lived continuously at the same address and had the same telephone number since September of 1979. By Petitioner's own testimony, he got in touch with Rich on May 20 or 21, 1980 by telephoning Rich's mother's house. It was these circumstances of such an egregious violation of Maryland Rule 741, compounded by Petitioner's failure to timely alert the court of Petitioner's whereabouts on May 20 or 21, which caused the court to exercise its discretion and prohibit Rich from testifying. Compare, State v. Silva, 118 R.I. 408, 374 A.2d 106 (1977), where the trial court was held to have abused its discretion in excluding the defendant's alibi testimony where, although the defendant's notice of alibi was 10 days late under the rule, notice of the existence of three alibi witnesses was first provided six months prior to trial.

Moreover, Petitioner was not precluded entirely from presenting his alibi defense by the trial court's ruling. Maryland Rule 741d3 only requires the disclosure of all alibi witnesses "other than the defendant." Therefore, Petitioner could have presented his alibi defense through his own testimony. However, the record clearly indicates that Petitioner waived his

right to testify because he did not wish to be impeached with two prior convictions. (Apx. 4-9).

Given Maryland's discovery rule and the gross nature of Petitioner's violation of that rule in the present case, the instant case fails to present the proper circumstances for this Court's review of the constitutional issues asserted.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Rule 741 Discovery and Inspection.

a. Disclosure Without Request.

Without the necessity of a request by the defendant, the State's Attorney shall furnish to the defendant:

1. Any material or information within his possession or control which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce his punishment therefor;

2. Any relevant material or information regarding: (a) specific searches and seizures, wire taps and eavesdropping, (b) the acquisition of statements made by the defendant, and (c) pretrial identification of the defendant by a witness for the State.

3. The State's Attorney's obligations under this section extend to material and information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office.

b. Discovery by the Defendant.

Upon the request of the defendant, the State shall:

1. Witnesses.

Disclose to the defendant the name and address of each person then known whom the State intends to call as a witness at the hearing or trial to prove its case in chief or to rebut alibi testimony.

2. Statements of the Defendant.

As to all statements made by the defendant to a State agent which the State intends to use at a hearing or trial, furnish the defendant: (a) a copy of each written or recorded statement and (b) the substance of each oral statement and a copy of all reports of each oral statement.

3. Statements of Codefendants.

As to all statements made by a codefendant to a State agent which the State intends to use at a hearing or trial, unless a severance has been ordered by the court, furnish the defendant: (a) a copy of each written or recorded statement, and (b) the substance of each oral statement and a copy of all reports of each oral statement.

4. Reports of Experts.

Produce and permit the defendant to inspect and copy all written reports or statements made in connection with the particular case by each expert consulted by the State, including the results of any physical or mental examination, scientific test, experiment or comparison, and furnish the defendant with the substance of any oral report and conclusion made in connection with the particular case by each expert consulted by the State, including the results of any physical or mental examination, scientific test, experiment or comparison.

5. Evidence for Use at Trial.

Produce and permit the defendant to inspect and copy any books, papers, documents, recordings, or photographs which the State intends to use at the hearing or trial, and produce and permit the defendant to inspect and

photograph any tangible objects which the State intends to use at a hearing or trial.

6. Property of the Defendant.

Produce and permit defendant to inspect, copy and photograph any item obtained from or belonging to the defendant, whether or not the State intends to use the item at the hearing or trial.

c. Matters Not Subject to Discovery by the Defendant.

This Rule does not require the State to disclose:

1. Any documents to the extent that they contain the opinions, theories, or conclusions or other work product of the State's Attorney, and
2. The identity of a confidential informant so long as the failure to disclose the informant's identity does not infringe a constitutional right of the defendant, and the State's Attorney does not intend to call the informant as a witness, and
3. Any other matter if the court finds that by disclosure there is a substantial risk of harm to any person which outweighs the interest in disclosure.

d. Discovery by the State.

Upon the request of the State, the defendant shall:

1. Generally.

As to the person of the defendant:

- (a) Appear in a lineup for identification;
- (b) Speak for identification;
- (c) Be fingerprinted;
- (d) Pose for photographs not involving reenactment of a scene;
- (e) Try on articles of clothing;
- (f) Permit the taking of specimens of material under his fingernails;
- (g) Permit the taking from his body of samples of blood, hair and other material involving no unreasonable intrusion upon his person;
- (h) Provide specimens of his handwriting;
- (i) Submit to reasonable physical or mental examination.

2. Reports of Experts.

Produce and permit the State to inspect and copy all written reports made in connection with the particular case by each expert which the defendant intends to call as a witness at the hearing or trial, including the results of any physical or mental examination, scientific test, experiment or comparison, and furnish the State with the substance of any oral report and conclusion made in connection with the particular case by an expert which the defendant intends to use at the hearing or trial, including any physical or mental examination, scientific test, experiment or comparison.

3. Alibi Witnesses.

Upon designation by the State of the time, place and date of the alleged

occurrence, furnish the name and address of each witness other than the defendant whom the defendant intends to call as a witness to show he was not present at the time, place and date designated by the State in its request.

e. Procedure for Discovery.

1. Time for Discovery.

The State shall make disclosure pursuant to section a of this Rule within 25 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 723 (Appearance — Provision for or Waiver of Counsel). The defendant shall make a request for discovery pursuant to section b of this Rule, and the State shall make a request for discovery pursuant to section d of this Rule within 15 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 723 (Appearance — Provision for or Waiver of Counsel). The party served with the request shall furnish the discovery required by this Rule within 10 days after receipt of the request.

2. Motion to Compel Discovery.

If discovery is not furnished as requested, a motion to compel discovery may be filed within ten days after receipt of the discovery or after discovery should have been received, whichever is earlier. The motion shall specifically describe the matters requested which have not been furnished. An answer to the motion may be filed within five days after receipt of the motion. The court may not consider any motion to compel discovery unless the moving party certifies in the motion and sets forth specific facts to demonstrate that he has made a good faith attempt to secure the requested discovery from the opposing party and the party has not complied with the request.

f. Continuing Duty to Disclose.

If, subsequent to compliance with a request made under this Rule or with any order compelling discovery, a party discovers additional matter previously requested and required to be furnished, he shall promptly furnish the matter to the other party or his counsel. If the additional matter is discovered during trial, in addition to furnishing the matter promptly to the other party or his counsel, he shall notify the court that the matter is being furnished to the other party.

g. Protective Orders.

Upon motion and for good cause shown, the court may order that specified disclosures be restricted. If at any time during the proceedings it is brought to the attention of the court that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances. All material and information to which a party is entitled must be disclosed in time to permit beneficial use thereof.

1 that discretion and refuse to permit the defendant to call his
2 alibi witness for his failure to comply with Maryland Rule
3 741(d)(3).

4 MS. PERRY: Your Honor, would you hear us just one
5 moment further? I realize you have ruled already.

6 THE COURT: No, once I have ruled -- I gave
7 everybody all of the time they wanted to say whatever they
8 wanted to say.

9 MS. PERRY: Then, would you please hear us on a
10 motion in limine with regard to a prior record, so that the
11 man might testify in his own behalf?

12 THE COURT: Yes. I thought you were talking about
13 the alibi witness. I am not preventing you from saying
14 anything new to me about some other subject. I will listen
15 to you on the motion in limine.

16 MS. PERRY: The reason my client is not taking the
17 stand is because he has, I believe, two prior convictions.
18 That is a matter of record. We gave the court that
19 information, or the state did, during the pretrial. This
20 man is faced with 20 years on the armed robbery plus 15 for
21 use of a handgun in the commission of a felony. If he
22 takes the stand and testifies, then, without limiting the
23 state, it can cross examine him and ask him about prior
24 convictions, and he has one in 1972 for larceny, 1974
25 robbery with a deadly weapon. We would like to ask the court,

(ApX.4)

because of the highly prejudicial nature of that kind of evidence, him being the only witness that he has, that the state be limited and not be allowed to bring that evidence out, in lieu of the alibi witness, and also that the state not be allowed to ask the question of my client on the stand, nor to argue it, where is your alibi witness.

THE COURT: Would you intend to say anything about any alibi witness, if you cross examined him?

MR. BONSIB: Well, I don't know, Your Honor. I can't say, at this point. I certainly will try to steer clear of it.

THE COURT: No. I am just trying to find out whether, I have to make a ruling, if you are going to say, you don't know, or you have to use it, then I will make a ruling.

MR. BONSIB: Let me not say I am not going to do it then, unless you make a ruling.

THE COURT: Say that again?

MR. BONSIB: I can't tell you for sure what I am going to do.

THE COURT: Motion in limine granted as to the failure to call the alibi witness. What about the record?

MR. BONSIB: The record is one of moral turpitude. Ms. Perry made an issue of my victim's prior record, that he had been convicted of a B&E.

MS. PERRY: You didn't object.

MR. BONSB: I know when an objection is well founded.

In this particular case, I think the issue of credibility is obviously the key issue in this defense, and the defendant's prior record for armed robbery certainly goes to his believability and credibility. We would strenuously argue it is proper and we should be allowed to cross examine the defendant on it.

THE COURT: Anything else?

MS. PERRY: No.

THE COURT: The motion in limine as to the prior record is denied.

MS. PERRY: May I have the court's indulgence one moment.

We would rest, at this time, Your Honor. The defendant cannot testify, and the motion in limine that you granted for us with regard to alibi has no application, at this time. He cannot testify in his own behalf.

THE COURT: He can testify in his own behalf. He chooses not to.

MS. PERRY: That is because I know what the prejudicial effect of that is going to be.

THE COURT: But he can testify.

I want to make sure you have discussed with him his right to testify.

MS. PERRY: He knows that, please. If you are

1 THE COURT: And his waiver of his institutional
2 right to testify in his own behalf. Do you waive that, sir?

3 THE DEFENDANT: If the court will permit, Your
4 Honor, like I was telling Ms. Perry, my lawyer, we had a
5 preliminary or pretrial hearing with Mr. Bonsib, and he
6 knows that I had informed him that I had a witness. I could
7 not get in contact with her --

8 THE COURT: I don't mean to cut you short, but I
9 am not going to go back into my ruling on the alibi witness.
10 I want to make sure you understand that you have a right to
11 testify. If you choose not to do that --

12 THE DEFENDANT: Judge McCullough, I don't understand
13 one thing. Okay, I am not familiar with law, as you are.
14 Okay, she explained it to me already, that she already
15 argued that point. However, the point I am trying to express
16 to you, Mr. Bonsib, here, and Judge Melbourne were present
17 when I informed them that I had a witness. I could not
18 contact her. Right?

19 THE COURT: Mr. Taliaferro, again, I have ruled
20 on the alibi, and I don't wish now to debate that with you.
21 All I am trying to find out now is if you want to take the
22 stand in your own behalf.

23 THE DEFENDANT: Judge McCullough, I understand
24 what you are saying --

25 THE COURT: Don't interrupt me, please? If you are

(Apx. 7)

1 called to the stand to testify, which you have a right to
2 do, the state will be permitted to ask you about your prior
3 record on cross examination, so that the jury will have the
4 benefit of your record to use that, if it is of any use to
5 them at all, on your credibility.

6 Your attorney has said to me you choose not to
7 testify because you are afraid of that. That is perfectly
8 all right. I just want to make sure that you understand
9 that you have a right to take the stand and testify in your
10 own defense and you have made the judgment you don't want to
11 do so. That is all I want to find out. If you want to
12 testify, fine. If you don't want to testify, fine. The
13 choice is solely yours.

14 THE DEFENDANT: So what you are asking me is whether
15 or not I want to testify?

16 THE COURT: Yes, sir. That choice is only yours
17 to make, after you listen to your lawyer, and after you
18 have listened to what I say, it is your decision alone to make.
19 That is the only thing I am asking you.

20 THE DEFENDANT: What about the things that I don't
21 understand. You know, I understand that perfectly clearly.

22 THE COURT: Lets get over this first.

23 THE DEFENDANT: I am going by what my lawyer says.
24 I agree with whatever she says which is I will not testify.

25 THE COURT: You have made that decision?

1 THE DEFENDANT: I am going by what she says.

2 THE COURT: All right.

3 THE DEFENDANT: Now, if you can explain and clarify
4 that point, why can't you explain and clarify the point that
5 I am trying to get over to you, Your Honor, which is, I don't
6 understand the alibi witness, when I said I had a witness,
7 although I never had a chance to inform the witness that I
8 was coming to court, I never had a chance to contact her.
9 This is what I am saying. Although you ruled on this
10 situation, which I don't understand. You know, it is only
11 fair to me if you can explain one thing, why not explain the
12 other?

13 THE COURT: I thought I explained it rather well
14 for the record, and if you didn't understand it, I am sorry,
15 but I don't intend to go back and explain it again, or how
16 I ruled. I have made a ruling, sir, and I am sticking by
17 that, and in the event I am in error, there is somebody
18 higher than I that can correct that.

19 Anything else, Ms. Perry?

20 MS. PERRY: No, sir.

21 THE COURT: Then, we are ready to go to the jury?

22 MR. BONSIB: Yes, Your Honor, the state is ready.

23 MS. PERRY: I would like to make my motion for
24 judgment of acquittal.

25 THE COURT: Any further argument on that?

(Apx. 9)

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AFFIDAVIT

I, Diane G. Goldsmith, do affirm on my personal knowledge as follows:

1. That I am a member of the Bar of the Supreme Court of the United States.
2. That I am the attorney for Respondent in the above-captioned case.
3. That on April 29, 1983, ten (10) copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari were sent to the Supreme Court and three (3) copies were sent to Counsel for Petitioner, Michael R. Malloy, Esquire, Assistant Public Defender, Tower Building, 222 E. Baltimore Street, Baltimore, Maryland 21202 by depositing same, postage prepaid, in the

United States mail.

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Attorney for Respondent

SUBSCRIBED AND SWORN to before me, a Notary Public in and
for the State of Maryland, on this 29th day of April, 1983.

Bonita L. Cosgrove
Notary Public

My commission expires: 7/1/86